Supreme Court, U.S.
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No. 88-833

In the Supreme Court of the United States

OCTOBER TERM, 1988

DOMINIC MARIANI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order dismissing the indictment against petitioner on the ground that the government had made impermissible use of testimony given by petitioner before a grand jury.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d); conspiring to commit extortion, in violation of 18 U.S.C. 1951; making illegal payments to a union representative, in violation of 29 U.S.C. 186(a)(2); and making illegal payments to influence the operation of an employee benefit plan, in violation of 18 U.S.C. 1954. He was sentenced to concurrent four-year terms of imprisonment, to be served consecutively to a sentence imposed on a separate conviction.

On August 17, 1987, after a post-trial evidentiary hearing pursuant to *Kastigar* v. *United States,* 406 U.S. 441 (1972), the district court vacated petitioner's convictions and dismissed the indictment against him. The court ruled that, in obtaining the conviction, the government had made impermissible non-evidentiary use of the testimony that petitioner had given to a grand jury under a grant of immunity (Pet. App. 17a-30a).

The court of appeals reversed and remanded the case for reinstatement of the verdict of conviction and for sentencing (Pet. App. 1a-14a). The court concluded that the district court's findings regarding the government's alleged non-evidentiary use of petitioner's immunized testimony were erroneous and that the uses the government allegedly made of the testimony were insubstantial.

Petitioner contends (Pet. 19-24) that the decision of the court of appeals permits the non-evidentiary use of immunized testimony and incorrectly construes both the federal immunity statute, 18 U.S.C. 6002, and this Court's leading decision dealing with the use of immunized testimony, *Kastigar* v. *United States,* 406 U.S. 441 (1972). Whatever the merits of petitioner's contentions, they are not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss the indictment. If, after reinstatement of the conviction and sentencing by the district court, the court of appeals were to reverse petitioner's conviction and remand for a new trial because of trial error, petitioner's immunity claims might be mooted by an acquittal following a second trial on the merits. If, on the other hand, the court of appeals affirms his conviction, petitioner will be able to present his *Kastigar* claim to this Court, together

with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

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